

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

UNITED STATES OF AMERICA)
)
 v.) MAGISTRATE-JUDGE'S No.
) 02-1003-JGD
)
JAMES RICHARDS)

MOTION TO EXCLUDE PSYCHIATRIC EVALUATIONS

Defendant, James Richards, respectfully moves that this Court exclude from evidence the psychiatric evaluations offered by the government. As grounds for this motion, defendant submits the following.

As noted in court, three of the evaluations consist of court-ordered evaluations for competency, criminal responsibility, and aid in sentencing. These evaluations were conducted pursuant to M.G.L. c. 123, §15(b), with respect to competency and criminal responsibility, and pursuant to M.G.L. c. 123, § 15(e), with respect to aid in sentencing. It is unclear how the government came to possess a fourth evaluation, which appears in the form of a letter to Mr. Richards' state defense lawyer.

Under Massachusetts law, statements made during such court-ordered examinations are protected with a type of judicial immunity. In Blaisdell v. Commonwealth, 372 Mass. 753, 758 (1977), the Supreme Judicial Court held "that a court-ordered

psychiatric examination is . . . a form of compelled production [within the meaning of the Fifth Amendment]." Id. The court also held that such compulsion was permissible only if the statements made were protected to an extent consistent with constitutional requirements barring both direct and derivative use of such statements. Id. at 762-63. The court noted the existence of M.G.L. c. 233, § 23B, which dictates that statements made during such examinations "shall [not] be admissible in evidence against [the defendant] on any issue other than that of his mental condition, nor shall it be admissible in evidence against him on that issue if such statement constitutes a confession of guilt of the crime charged." But Blaisdell held that the statute

falls short of the mandated equivalent of the privilege [against self-incrimination]. The statute does not bar disclosure of a defendant's statements nor their potential use for other purposes by the prosecution or the State. . . . Most importantly, to the extent the constitutional privilege protects the defendant from furnishing evidence bearing on his mental or emotional condition, neither § 20B nor § 23B affords him equivalent protection.

Id. at 763-64.

The court concluded that the privilege could be waived if the defendant offered evidence of a psychiatric examination at trial. Blaisdell then set forth procedures for ensuring that privileged statements made during court-ordered psychiatric

examinations under M.G.L. c. 123, § 15 would not be used in a way that violated the privilege. These require that:

The experts conducting the examination ordered by the court may not reveal to the prosecution or anyone acting in its behalf any evidence, statements, confessions or admissions obtained from the defendant except evidence derived from solely physical or physiological observation or tests, except as ordered by the court;

. . . .

Psychiatrists shall file a written report of their findings . . . and such report shall not be available to either prosecution or defense unless, on inquiry by the court, the court determines that it does not contain any matter, information or evidence based on the defendant's testimonial statements.

. . . .

If the report contains matter within the scope of the privilege, it shall be sealed and shall not be available to either party until such time during the course of the trial as the defendant raises the issue of insanity and makes clear to the court his intent either (a) to testify in his own behalf or (b) to place in evidence the testimony of psychiatric witnesses whose testimony will be based in whole or in part on the defendant's extrajudicial or judicial statements.

Blaisdell, 372 Mass. at 768.

The evaluations at issue here contain statements by the defendant. It appears that the requirements of Blaisdell were not followed, either by the state court or by the state court prosecutor. See Commonwealth v. Stroyny, 435 Mass. 635, 645 (2002) (finding improper conduct in psychiatrist's disclosure of defendant's statements to prosecutor). While Blaisdell does

state that "the circumstances of each case may require a degree of flexibility," Blasidell, 372 Mass. at 769, there is no indication what those circumstances might have been in this case. Nor has the government provided an order indicating that the state court found disclosure to a federal prosecutor or investigator was warranted.

Mr. Richards did not waive his privilege in a manner that would permit disclosure in federal court. One of the evaluations in question, in a section labeled "Warning of Limits of Confidentiality," states that the psychologist informed the defendant that she had been ordered "to evaluate him regarding his competence to stand trial, his criminal responsibility, and his need for care and treatment."

The report recounts that

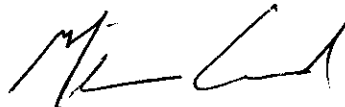
Mr. Richards understood the purpose of the evaluation, *"basically to determine my competence to stand trial and my criminal responsibility and that's basically it."* He understood also that the court would receive a written report of my evaluation.

(emphasis in original). This indicates that Mr. Richards believed that the sole purposes of the interview and examination were for competence and criminal responsibility in the state court case. Furthermore, it appears that he was informed that only the state court would receive a copy of the report. Thus, any limited waiver of confidentiality that Mr. Richards provided did not include dissemination to the state court prosecutor, much

less to a federal prosecutor or agent. See Commonwealth v. Lamb, 365 Mass. 265 (1974).

The fact that these evaluations are being offered at a detention and probable cause hearing, to which the rules of evidence do not apply, is immaterial. The rule established by Massachusetts statute confers a type of court-ordered immunity. Permitting use of the statements provided under a grant of immunity would violate the Fifth Amendment to the U.S. Constitution. See Murphy v. Waterfront Commission, 378 U.S. 52, 78 & n.18 (1964) (holding that state commission's grant of immunity to witness protected witness against direct and derivative use of testimony in federal prosecution).

JAMES RICHARDS
By his attorney,



Miriam Conrad
B.B.O. #550223
Federal Defender Office
408 Atlantic Avenue, 3rd Floor
Boston, MA 02210
Tel: 617-223-8061

CERTIFICATE OF SERVICE

I, Miriam Conrad, hereby certify that a true copy of the above document was served upon George Z. Toscas, Trial Attorney, U.S. Department of Justice, by first-class mail and FAX on October 31, 2003.



Miriam Conrad